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No. 07-886

In The

Supreme Court of the United States

STATE OF IOWA,

Petitioner,

vs.

JAMES HOWARD BENTLEY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR WRIT OF CERTIORARI

THOMAS J. MILLER
Attorney General of Iowa

MARY TABOR
Assistant Attorney General
Counsel of Record
Hoover State Office Building
Des Moines, Iowa 50319
Telephone: (515) 281-5976
Fax: (515) 281-4902
E-mail: mtabor@ag.state.ia.us
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a child's report of sexual abuse to a hospital counselor is "testimonial" for purposes of the Confrontation Clause if the statements are made during an interview which serves both therapeutic and investigatory purposes.

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The Iowa Supreme Court's opinion is reported as *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007) and is attached at Appendix pages 1-16. The two trial court rulings are unpublished and attached at Appendix pages 17-61.

JURISDICTION

The Iowa Supreme Court issued its decision on September 28, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE

This case exemplifies the quandary faced by state courts trying to apply *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. ___, 126 S. Ct. 2266 (2006) to statements made by child victims in settings which mix therapeutic and investigative purposes.

1. In January of 2004, a child psychiatrist diagnosed the victim, J.G., with depression, oppositional defiance disorder, and attention deficit hyperactivity disorder. During 2004, she was hospitalized three times, once following a suicide attempt. On November 16, 2004, J.G. was an in-patient in the juvenile psychiatric ward at St. Luke's Hospital in Cedar Rapids, Iowa when she participated in a videotaped interview at the hospital's Child Protection Center. Hearing Tr. (5-31-06) at 68.

St. Luke's Child Protection Center is affiliated with a network of more than 600 centers advocating for abused children located in all 50 states. The purpose of the center is to provide suspected victims of child abuse with centralized access to services, including medical examinations and psychosocial assessments. The center features a multi-disciplinary team, which includes a physician, the hospital counselor, a Department of Human Services assessment worker and a police officer.

J.G. was 10 years old at the time of the interview, but an expert placed her developmental age at seven or a bit younger. Hearing Tr. (5-31-06) at 77, 81-82. During the interview, J.G. alleged that the respondent molested her starting when she was eight years old and continuing over the course of two years.

Hospital counselor Roseanne Matuszek conducted the interview in a room designed to put children at ease. Cedar Rapids police officer Ann Deutmeyer and state Department of Human Services

worker Pam Holtz, who arranged for the interview, observed through a two-way mirror. Neither ever spoke with J.G. Hearing Tr. (5-31-06) at 14-15. Ms. Matuszek told J.G. that "Pam" from DHS and "Ann" from the police department were watching, but said they were "just going to listen to us talk and are not going to come in here and bother us." J.G. did not appear fazed by learning of their presence, indeed, she casually picked her nose as the interviewer explained the arrangement. The counselor also made J.G. aware that the interview was being recorded.

As the counselor started to tell J.G. that the room was a "safe place for boys and girls to come talk to me" and that "you can say anything in this room and you're not going to get into trouble," J.G. volunteered: "the reason why I'm acting this way is because I've been molested." Hearing Tr. (5-31-06) at 65. When Ms. Matuszek asked how J.G. had been acting, the girl explained: "throwing the fits." The counselor also advised J.G. that it was important to tell the truth and not "make up stories." J.G. interrupted to say she was "not lying." State's Exhibit 2 (Videotape).

During the 40-minute videotaping, J.G. revealed that James Bentley, her mother's former boyfriend, had rubbed his penis against her buttocks while bathing with her, had photographed her posed naked with her legs spread apart, had "licked" her vagina, and "played sex" with her by climbing on top of her and sliding his penis between her closed legs, using "spit" for lubrication. J.G. said Bentley would go "up

and down, up and down" on top of her. State's Exhibit 1 (Patient Interview Report).

When Ms. Matuszek asked near the end of the session whether J.G. was worried about anything, J.G. responded: "I'm worried about me throwing fits." State's Exhibit 2. At no point during the interview did the counselor or J.G. mention anything about J.G.'s statements being used for prosecutorial purposes or any possibility that Bentley could be punished for what he did to her. Hearing Tr. (5-31-06) at 56.

After her interview, J.G. went for a medical examination. Then the child protection team – composed of the counselor, the physician, the child protection worker and the police officer – met to develop recommendations. The team recommended that the girl undergo sexual abuse counseling and have no contact with James Bentley. State's Exhibit 1 (Patient Interview Report). They left any further action to the department of human services and the police.

2. As a result of J.G.'s allegations, the State filed trial informations charging Bentley with two counts of sexual abuse in the second degree for engaging in sex acts with a child under the age of 12. A few months after the charges were filed and before J.G. could testify, Bentley's brother kidnaped, raped and killed her. The record does not reveal direct involvement by respondent in the victim's murder.

In April of 2005, the respondent sought a preliminary determination of whether J.G.'s videotaped

interview would be admissible under the Confrontation Clause. On May 20, 2005, the district court ruled the victim's videotaped statements would be admissible in the sexual abuse trials. The trial judge found J.G.'s statements were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004) because the government's involvement in the interview was "peripheral" and "the circumstances surrounding the interview suggest that a child of J.G.'s age would not reasonably believe that her disclosures to Ms. Matuszek would be available to use at a later trial." Appendix pages 39-54.

After unsuccessfully seeking interlocutory review to the Iowa Supreme Court, the respondent, represented by new counsel, asked the district court to reconsider the Confrontation Clause issue. A different judge excluded J.G.'s statements, finding they were "testimonial" because the counselor was acting as a "surrogate" for the police during the hospital interview. Appendix pages 17-38. The State sought discretionary review, asserting that without J.G.'s videotaped statements the prosecution could not realistically go forward. The Iowa Supreme Court granted review.

3. The Iowa Supreme Court affirmed the district court's determination that admission of J.G.'s statements would violate the Confrontation Clause. In doing so, the Iowa court found it "unnecessary" to analyze the purpose of the statements from the child declarant's perspective.

The state court chronicled the "close, ongoing relationship" between the center and local law enforcement. Appendix pages 7-10. The court noted the child protection worker and police officer arranged J.G.'s interview and watched through an observation window. Appendix pages 7-8. The court pointed out the hospital counselor took a break toward the end of the interview to ask the observers whether she "forgot" to ask any questions. Appendix page 9. However, nothing the counselor asked after the break elicited any further information from J.G.

The Iowa Supreme Court praised the St. Luke's center for performing "very important and laudable services in furtherance of the protection of children." Appendix page 14. The Iowa court described the comfortable setting of the interview room and acknowledged: "It is beyond dispute that information gathered from J.G. in such a child-friendly, safe environment could have been very useful in the treatment of her well-documented psychological conditions. The work of the CPC and the team of professionals who took J.G.'s statement is not impugned by our characterization of J.G.'s statements as 'testimonial.'" Appendix page 14.

The state supreme court recognized that "one of the significant purposes of the interrogation was surely to protect and advance the treatment of J.G.," but the court did not venture to determine the "primary purpose" of the interview. The state court instead held that "the extensive involvement of police in the interview rendered J.G.'s statements

testimonial." Appendix pages 14-15. Petitioner now seeks review of the state supreme court's decision.

REASONS FOR GRANTING THE WRIT

When the Court adopted the new "testimonial" framework for analyzing the admissibility of statements under the Sixth Amendment's Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004), it declined to provide a comprehensive definition of "testimonial" statements. *Crawford's* narrow approach engendered a pressing need for more guidance as to what was covered by the new rule.

Questions abounded concerning the impact of the new framework on two specialized fields of criminal prosecution: domestic violence and child abuse. In both fields, circumstances often prevent victims from testifying at trial, leaving prosecutors to prove their cases largely through out-of-court statements. In *Davis v. Washington*, 547 U.S. ___, 126 S. Ct. 2266 (2006), the Court defined the parameters of the Confrontation Clause for two common domestic violence scenarios: 911 calls and on-the-scene questioning by law enforcement. *Davis,* however, purposely did little to clarify issues surrounding child abuse prosecutions.

During the nearly four years since the Court decided *Crawford,* the question of when a child's report of abuse should be considered testimonial has percolated among the lower courts. "Courts around

the nation have struggled with the application of *Crawford* to child witnesses. . . . " *Lagunas v. State*, 187 S.W.3d 503, 519 (Tex. App. – Austin 2005) (describing its task of deciding whether a child's statement was testimonial as "attempting to hit a 'moving target.'"). The struggle of the lower courts to apply *Crawford* and *Davis* to reports of abuse by children has produced divergent results based on varying rationales. The confusion will only be dispelled when the Supreme Court clarifies the legal test to apply to children's statements.

A. Lower courts are divided on the question whether a child's report of abuse to someone other than a police officer is "testimonial."

In the wake of *Crawford* and *Davis*, state courts have reached conflicting decisions concerning the "testimonial" nature of children's statements. The decisions especially diverge when the children are speaking to adults who are not police, but who intend both to assess the child's health and welfare and to share the information with investigators. Interviewers working for multi-disciplinary Children's Advocacy Centers epitomize this dual role.

The sharpness of the conflict is best illustrated by the opposite positions taken on this question by the supreme courts in the neighboring states of Iowa and Minnesota. In both *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007) and *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007), the child declarants were assessed at a

hospital rather than a police station; both children were referred to the assessment center by social services and law enforcement; both children were interviewed by an employee of the hospital and not a government actor (though in *Bentley* an officer watched the interview through an observation window while in *Krasky* police were not present); both interviews were videotaped; both interviewers recommended sexual abuse counseling after hearing the children's reports of abuse; and both children were unavailable at the time of trial. Despite these many similarities, the two courts reached contrary conclusions concerning the testimonial nature of the children's statements. In Minnesota, the child's statements may be used at trial without violating the defendant's Confrontation Clause rights. But across Minnesota's southern border in Iowa, the offender charged with raping the child may avoid prosecution because the child's voice cannot be heard at trial. It is very difficult to reconcile these results. The conflict cannot be resolved without a decision of this Court.

The split is not limited to Iowa and Minnesota. In deciding *Bentley*, the Iowa Supreme Court joined one federal circuit court of appeals and four other state courts of last resort, which have read *Crawford* to exclude the statements of an unavailable child witness as "testimonial" under the Confrontation Clause when they were made to a private interviewer at a children's advocacy center. *See United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005); *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007); *State v. Snowden*, 867 A.2d

314 (Md. 2005); *State v. Justus*, 205 S.W.3d 872 (Mo. 2006); *State v. Blue*, 717 N.W.2d 558 (N.D. 2006). Eight intermediate state appellate courts also have found that statements made to a member of a multi-disciplinary team were "testimonial." *See L.J.K. v. State*, 942 So.2d 854 (Ala. Crim. App. 2005); *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. App. 5 Dist. 2004); *People v. Sharp*, 155 P.3d 577 (Colo. App. 2006); *Hernandez v. State*, 946 So.2d 1270 (Fla. App. 2007); *State v. Hooper*, ___ P.3d ___, 2006 WL 2328233 (Idaho App. 2006); *State v. Pitt*, 147 P.3d 940 (Or. App. 2006); *In re S.R.*, 920 A.2d 1262 (Pa. Super. 2007); *Rangel v. State*, 199 S.W.3d 523 (Tex. App. – Fort Worth 2006).

On the other side of the split are two state courts of last resort which have decided that a child's statements to a private actor who was a member of a child abuse assessment team were nontestimonial. *See People v. Vigil*, 127 P.3d 916 (Colo. 2006); *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007); *State v. Scacchetti*, 711 N.W.2d 508 (Minn. 2006). The Eighth Circuit Court of Appeals also decided that a child's statements to a physician who worked with a children's advocacy center were nontestimonial when no "forensic interview" preceded the meeting with the physician. *United States v. Peneaux*, 432 F.3d 882, 895-96 (8th Cir. 2005). Three other intermediate state appellate courts have decided that children's statements to private actors who worked within the child assessment team were nontestimonial. *See People v. Geno*, 683 N.W.2d 687 (Mich. Ct. App. 2004); *State v.*

D.H., 2007 WL 3293361 (Ohio Ct. App. 2007); *State v. Edinger*, 2006 WL 827412 (Ohio Ct. App. 2006); *State v. Foreman*, 157 P.3d 228 (Or. App. 2007).

Even outside the context of child assessment centers, state courts of last resort differ on the question whether children's statements to government-employed child protection workers must be viewed as testimonial. *Compare State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006) (holding neither government questioner nor three-year-old declarant were acting to produce statement for trial) *with State v. Mack*, 101 P.3d 349 (Or. 2004) (three-year-old victim's statements to Department of Human Services worker were testimonial because worker was "proxy" for police).

Because *Crawford* and *Davis* provide insufficient guidance on how to determine if children's reports of abuse are testimonial, the division among the lower courts does not promise to correct itself.

B. A pressing need exists for the Supreme Court to dispel the lower courts' confusion over what legal tests may be derived from *Crawford* and *Davis* to determine the testimonial nature of children's statements.

The inconsistency among the analyses applied by lower courts to determine whether children's statements are testimonial is even greater than the split in outcomes. *Crawford* and *Davis* were purposely incremental in defining "testimonial." Lower courts have filled the doctrinal void with idiosyncratic tests

to gauge which statements by children are the equivalent of in-court testimony. The variation in those legal tests trains on two questions: (1) can the "primary purpose" language in *Davis* be transported to the context of child abuse reports? and (2) how does the language in *Crawford* concerning the reasonable expectations of the declarant apply to statements made by young children? The divergent treatment of these two inquiries further demonstrates why it is necessary for the Court to resolve the question presented here.

1. The decision of the Iowa Supreme Court conflicts with the decisions of other state supreme courts which try to apply or adapt the "primary purpose" test articulated in *Davis*.

A major dividing point for lower courts is whether and how to apply the "primary purpose" test articulated in *Davis*. The *Davis* Court eschewed producing an "exhaustive classification of all conceivable statements" as either testimonial or nontestimonial, but instead held that the following dichotomy sufficed to settle the precise scenarios before the Court. Statements were "nontestimonial" when made during a police interrogation under circumstances objectively showing that the interrogation's "primary purpose" was to enable police to meet an ongoing emergency. By contrast, statements were "testimonial" when there was no ongoing emergency and the "primary purpose" of the interrogation was to prove

past events potentially relevant to a later prosecution. *Davis v. Washington*, 547 U.S. ___, 126 S. Ct. at 2273-2274.

Inevitably, the "primary purpose" component of *Davis* has found its way into the testimonial analysis concerning statements made by child victims. Some lower courts have viewed the "primary purpose" test as a flexible one and not limited to situations involving an emergency/non-emergency dichotomy. For example, in *State v. Krasky*, 736 N.W.2d at 643, the Minnesota Supreme Court declined to "read the *Davis* opinion to hold that only those statements made in response to an immediate danger are nontestimonial." The *Krasky* Court reasoned:

> The facts of *Davis* required the court "to determine more precisely which police interrogations produce testimony" and the precise question was whether emergency calls to police are treated differently than statements made in the regular course of a police investigation. *Id.* at 2273-74. The court specifically noted that its holding was limited to its facts. *Id.* at 2278 n. 5. . . . We conclude that the *Davis* decision leaves undisturbed our conclusions in *Bobadilla* and *Scacchetti* that statements elicited by a medical professional for the primary purpose of protecting a child sexual assault victim's health and welfare are nontestimonial.

State v. Krasky, 736 N.W.2d at 643.

Several intermediate state appellate courts examining children's reports of abuse likewise have determined that "the absence of an emergency does not, alone, make the statements testimonial." *Lollis v. State,* 232 S.W.3d 803, 807 (Tex. Ct. App. – Texarkana 2007) (applying "various factors" in determining "whether primary purpose of a statement was to get or give testimony or to accomplish some other purpose"); *see also Commonwealth v. Allshouse*, 924 A.2d 1215, 1223 (Pa. Super. 2007) ("we do not view the Supreme Court's primary purpose test as being reliant solely on the temporal relationship between the statement and the wrong the statement describes and, instead, view the test as encompassing the broader range of factors applied in *Davis*.").

Further examples of the flexible application of the primary purpose test are lower court decisions which have concluded that children's complaints addressed to health care providers were nontestimonial because they are made for the purpose of medical diagnosis or treatment, even though they are a report of past events. *See, e.g., United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005) ("statements made to physician seeking to give medical aid . . . are presumptively nontestimonial"); *Foley v. State*, 914 So.2d 677, 685 (Miss. 2005) (child's statements were part of "neutral medical evaluation"); *State v. Vaught*, 682 N.W.2d 284, 291-92 (Neb. 2004) (victim taken by family to hospital to be examined).

The Iowa Supreme Court's analysis in *Bentley* conflicts with the above decisions which exported the

"primary purpose" test to a child assessment and treatment context. The Iowa court recognized that "one of the significant purposes of the interrogation was surely to protect and advance the treatment of J.G." but nevertheless the court ignored the framework of *Davis* by failing to undertake a "primary purpose" analysis. Appendix pages 14-15. The Iowa court does not explain why the circumstances which objectively show the purpose of the hospital interview was to promote the child's health and welfare could not create a situation where her statements were nontestimonial akin to the emergency purpose of Michelle McCottry's 911 call in *Davis*. Just as Ms. McCottry's 911 call was not testimony but "plainly a call for help," (*Davis*, 126 S. Ct. at 2276), J.G.'s self-assessment that she was acting out because she had been molested was the child declarant's cry for protection and treatment, not prosecution. Just as "no 'witness' goes into court to proclaim an emergency and seek help," (*Davis*, 126 S. Ct. at 2276), no "witness" goes into court to seek a remedy for her mental disorders.

Other lower courts have followed the *Davis* framework, but have confined its "primary purpose" test to the emergency/non-emergency duality. State courts of last resort from Kansas, Missouri and North Dakota have emphasized the timing of the children's statements in determining they were testimonial. *See State v. Henderson*, 160 P.3d 776, 790 (Kan. 2007) ("There was no emergency; F.J.I. was speaking of past events and Henderson was not in her home; her

demeanor was calm."); *State v. Justus*, 205 S.W.3d 872, 880 (Mo. 2006) ("S.J.'s statements were not produced in the midst of an 'ongoing emergency.' Rather, the evidence shows that S.J. was not in any immediate danger. S.J. was speaking about past events, about what Justus *had* done."); *State v. Blue*, 717 N.W.2d 558, 565 (N.D. 2006) ("Because there was no 'ongoing emergency' and the primary purpose of the videotaped interview in this case was 'to establish or prove past events potentially relevant to a later criminal prosecution,' we hold the videotape recording constituted a testimonial statement."); *see also Hernandez v. State*, 946 So.2d 1270, 1282 (Fla. App. 2 Dist. 2007) (questioning did not enable police to meet ongoing emergency when sex abuse occurred a week earlier); *State v. Buda*, 912 A.2d 735, 745 (N.J. Super. A.D. 2006) (statement was taken "when N.M. was no longer in danger and there was no 'ongoing emergency'"); *Rangel v. State*, 199 S.W.3d 523, 534 (Tex. App. – Fort Worth 2006) (child "was not facing ongoing emergency").

It is understandable that lower courts, in the absence of an overarching test for determining which statements are testimonial, would try to shoehorn child abuse scenarios into the emergency language from *Davis*. Nevertheless, it is evident that *Davis* did not intend for its holding to be a one-size-fits-all solution to the problem of deciding which out-of-court statements are the equivalent of in-court testimony. Lower courts and practitioners who serve abused children require a better tailored legal test.

2. The decision of the Iowa Supreme Court conflicts with the decisions of other state supreme courts which take into account the reasonable expectations of the child declarant.

Many lower courts read *Crawford v. Washington*, 541 U.S. at 51-52, as creating an "objective witness" test when it set forth three formulations of the "core" class of testimonial statements, two of which mentioned the thought process of the declarant, *i.e.* pretrial statements the witness would reasonably expect to be used prosecutorially and those statements made under circumstances which would lead an objective witness to believe would be available for use at a later trial. *See, e.g., United States v. Saget*, 377 F.3d 223, 228 (2nd Cir. 2004) (noting that "*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at trial"); *United States v. Hendricks*, 395 F.3d 173, 181 (3rd Cir. 2005) (determining that intercepted statements between defendants and other third parties were not testimonial as the declarants did not make the statements in the belief that they might be used at a later trial); *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004) ("The proper inquiry . . . is whether the declarant intends to bear testimony against the accused."); *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005) ("We conclude that the 'common nucleus' present in the formulations which the

Court considered centers on the reasonable expectations of the declarant"); *People v. Vigil*, 127 P.3d 916, 925 (Colo. 2006) ("we believe an objective test focusing on the reasonable expectations of a person in the declarant's position under the circumstances of the case most adequately safeguards the accused's Confrontation Clause right and most closely reflects the concerns underpinning the Sixth Amendment.").

The "objective witness" test has drawn skepticism after *Davis*. Some lower courts believe this Court switched from gauging the reasonable expectations of the declarant in *Crawford* to assessing only the intent of the questioner in *Davis*. *See State v. Siler*, 876 N.E.2d 534, 541 (Ohio 2007) ("The court's analysis in *Davis* does not focus on the expectations of the declarant . . . the test set forth in *Davis* centers on the statements and the objective circumstances indicating the primary purpose of the interrogation"); *State v. Mason*, 162 P.3d 396, 401 (Wash. 2007) ("the objective test seemed to shift from the declarant in *Crawford* to the interrogator in *Davis*"); *see also State v. Alvarez*, 143 P.3d 668, 672 (Ariz. App. 2006) ("Although not entirely clear, the Court in *Davis* apparently shifted the focus from the motivations or reasonable expectations of the declarant to the primary purpose of the interrogation."); *State v. Hooper*, ___ P.3d ___, 2006 WL 2328233, *5 (Idaho Ct. App. 2006) (finding objective witness test "discredited by *Davis*, which focuses not at all on the expectations of the declarant but on the content of the statement, the

circumstances under which it was made, and the interrogator's purpose in asking the questions").

Other courts and commentators are not convinced that the Court abandoned all concern about the declarant's perspective when deciding if a statement is testimonial. *See, e.g., People v. Stechly*, 870 N.E.2d 333, 359 (Ill. 2007) (finding that "outside the context of statements produced in response to government interrogation, it is the declarant's perspective which is paramount in a testimonial analysis"); *State v. Jensen*, 727 N.W.2d 518, 525 (Wis. 2007) (viewing *Davis* as "slightly expand[ing]" previous discussion of what constitutes testimonial statements and looking to subjective purpose of declarant in making statement); Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & Policy 553, 560 (2007) (maintaining that the perspective of the witness "should be the crucial" consideration even after *Davis*). Professor Friedman highlighted the statement from *Davis*: "And of course even when interrogation exists . . . it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* (citing *Davis v. Washington*, 547 U.S. at ___ n.1, 126 S. Ct. at 2274 n.1).

It is evident from this debate that *Davis* raised more questions than it answered concerning how a declarant's intent factors into the analysis of what statements are testimonial. The Court must resolve this major doctrinal dilemma before the legal community can function properly within the new

confrontation framework. Resolution is especially critical for lower courts called upon to examine whether and how an objective witness standard should be applied to a child declarant. *See State v. Henderson*, 160 P.3d 776, 784 (Kan. 2007) ("*Davis* did not address, however, what part, if any, the mindset of the declarant still plays in the testimonial calculus, much less the mindset of a child declarant as in the instant case.").

The age and developmental level of child witnesses have received uneven treatment among lower courts called to determine the admissibility of their statements. It is possible to discern four distinct approaches adopted by jurisdictions which have tackled this aspect of the Confrontation Clause question since *Crawford*.

One approach has been to consider an objectively reasonable person *in the child's position* when determining the statements were nontestimonial. For instance, a Texas appellate court began its Confrontation Clause analysis by considering "the age and sophistication of D.M.," who was four years old at the time she told a police officer that "a bad man had killed her [mommy] and took her away." The appellate court decided "that D.M.'s age and her emotional state are factors strongly suggesting that her statements to Officer Sullivan were non-testimonial." *Lagunas v. State*, 187 S.W.3d 503, 519 (Tex. App. – Austin 2005). Other jurisdictions have given primary consideration to the declarant's age when determining whether statements were testimonial. *See United*

States v. Coulter, 62 M.J. 520, 528 (N.M. Ct. Crim. App. 2005) ("Two-year-old KL could no more appreciate the possible future uses of her statements than she could understand the significance of what she was communicating."); *State v. Bobadilla*, 709 N.W.2d 243, 255 (Minn. 2006) ("given T.B.'s very young age, it is doubtful that he was even capable of understanding that his statements would be used at a trial"); *see also State v. Brigman*, 615 S.E.2d 21, 25 (N.C. App. 2005) ("J.B.'s age raises the question as to whether he was even capable of reasonably believing that these statements would be used at trial."); *In re D.L.*, 2005 WL 1119809 (Ohio App. 2005) (three-year-old victim's statements to a nurse practitioner were nontestimonial, in part because, "a reasonable child of her age" would not have believed her statements were for anything other than medical treatment); *State v. Dezee*, 125 Wash. App. 1009, 2005 WL 246190 (Wash. Ct. App. 2005) (the reasonable belief of the nine-year-old declarant would be relevant to determine if her statements were testimonial).

A second approach has been to factor in the child declarant's age as part of an objective witness test only if the statements are not the product of police interrogation. For example, the Colorado Supreme Court reasoned:

> [A]n assessment of whether or not a reasonable person in the position of the declarant would believe a statement would be available for use at a later trial involves an analysis of the expectations of a reasonable

> person in the position of the declarant. Expectations derive from circumstances, and, among other circumstances, a person's age is a pertinent characteristic for analysis.

People v. Vigil, 127 P.3d 916, 925 (Colo. 2006). The *Vigil* court cautioned, however, "if a child makes a statement to a government agent as part of a police interrogation, his statement is testimonial irrespective of the child's expectations regarding whether the statement will be available for use at a later trial." *Id.* at 926 n.8; *see also People v. Stechly,* 870 N.E.2d 333 (Illinois 2007); *State v. Siler*, 876 N.E.2d 534 (Ohio 2007); *State v. Mack*, 101 P.3d 349 (Or. 2004).

A third approach has been to view the tender age of the declarant as one concern among the totality of circumstances leading to the testimonial determination. Decisions from Kansas and Missouri consider "a young victim's awareness, or lack thereof, that her statement would be used to prosecute" not as dispositive of whether her statement is testimonial, but as one factor to consider in light of *Davis*. *See State v. Henderson*, 160 P.3d at 784-85; *State v. Justus*, 205 S.W.3d at 879.

A fourth approach has been to give no sway to the young age of the declarant. The Iowa Supreme Court's decision in *Bentley* falls into this fourth category. The Iowa court declined to consider the child declarant's age and mental condition in determining the testimonial nature of her statements to a hospital counselor.

> The State asserts that J.G.'s statements are nontestimonial because a reasonable child of J.G.'s chronological age (10) and functional age (7) would not have understood her statements would be used to prosecute the defendant. We conclude, however, an analysis of the purpose of the statements from the declarant's perspective is unnecessary under the circumstances presented here.

Appendix page 10.

The Iowa court's resistance to viewing the purpose of the statements from the child's perspective is in line with decisions of the Maryland Supreme Court and several intermediate state appellate courts. *See State v. Snowden*, 867 A.2d 314, 329 (Md. 2005) (finding "concern for the testimonial capacity of young children overlooks the fundamental principles underlying the Confrontation Clause"); *see also People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 n.3 (Cal. App. 5 Dist. 2004) ("Conceivably, the Supreme Court's reference to an 'objective witness' should be taken to mean an objective witness in the same category of persons as the actual witness – here, an objective four year old. But we do not think so."); *State v. Hooper*, ___ P.3d ___, 2006 WL 2328233, *5 (Idaho Ct. App. 2006) (holding that *Davis* foreclosed State's argument that six-year-old declarant would not have understood her statements would be subject to use later at trial).

The disarray among lower courts on whether to consider the child declarant's perspective calls for

resolution. The doctrinal divide among the lower courts has created intolerable uncertainty concerning the admissibility of children's reports of abuse. If lower courts are mistaken in deeming statements testimonial even when child declarants are oblivious to their future use, then too many child abuse prosecutions are endangered. On the other hand, if lower courts are mistaken in finding statements are nontestimonial unless the child is able to comprehend that they may be used to prosecute the perpetrator, then too many defendants are having their confrontation clause rights violated. This Court should resolve the post-*Davis* debate about the relevance of a child declarant's intent.

Furthermore, state court decisions like *Bentley* which refuse to consider a child's inability to anticipate the prosecutorial use of his or her statements must be reconciled with indications in *Crawford* and *Davis* that a co-defendant's statements made "unwittingly" to an FBI informant in *Bourjaily v. United States,* 483 U.S. 171 (1987), would be considered nontestimonial. *See Davis,* 126 S. Ct. at 2275; *Crawford,* 541 U.S. at 58. Although law enforcement was extensively involved in obtaining Bourjaily's statements, the statements are not considered the equivalent of in-court testimony because the declarant was not aware of their planned use. The Court should clarify why child witnesses who cannot comprehend the prosecutorial purpose of their statements should be subject to a different analysis than adult co-conspirators.

C. This case poses a question of fundamental importance to a nationwide system of Children's Advocacy Centers.

The proliferation of Children's Advocacy Centers has been heralded as one of the most important innovations of this decade in providing services to child abuse victims. Nancy Chandler, *Children's Advocacy Centers: Making a Difference One Child at a Time*, 28 Hamline Journal of Public Law and Policy 315, 324 (Fall 2006). The first such center opened in 1985 and by 2006 the National Children's Alliance had accredited centers in all 50 states. *Id.* These centers use a multi-disciplinary team approach to reduce the number of interviews abused children must endure and to deliver coordinated intervention services. *Id.* The National Children's Alliance estimated that its more than 600 member centers served 160,000 children in 2005. National Children's Alliance Annual Report p. 2, available at *www.nca-online.org* (last visited 12/2/07). Three-quarters of the children receiving services were under 12 years old. *Id.*

The United States Department of Justice has encouraged this multi-disciplinary approach for the last ten years as a way to encourage appropriate questioning of children. *See* U.S. DOJ, Law Enforcement Response to Child Abuse, http://www.ncjrs.gov/pdffiles/162425.pdf. More than forty states have legislation authorizing multi-disciplinary teams. *See* Myrna Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency,*

Hearsay, and Confrontation, 82 Ind. L. J. 1009, 1023 (2007). Iowa law authorized the creation of child protection assistance teams like that operating from St. Luke's Hospital. *See* Iowa Code § 915.35.

The Iowa Supreme Court's assurance that it was not impugning the work of the St. Luke's program in finding the victim's statements to be "testimonial" does not allay the uncertainty faced by these centers in the wake of *Crawford* and *Davis*. These centers – by design – fulfill both therapeutic and investigative purposes. Lower court decisions which find children's statements to private interviewers to be testimonial overlook the independence of the non-law enforcement members of the team and undermine the effectiveness of the coordinated response to child abuse championed by these centers. The involvement of law enforcement on the child protection team which saves children the trauma of repeated stationhouse interviews is also the factor that some courts point to as rendering the children's statements testimonial. *See, e.g., State v. Snowden*, 867 A.2d 314, 327 (Md. 2005) (finding detective's presence during interview "overwhelms any argument that the statements were not testimonial because they were not in response to *police* questioning"); *In re S.R.*, 920 A.2d 1262, 1267 (Pa. Super. 2007) (finding it significant that police viewed proceeding through one-way glass and conferred with examiner).

The Iowa Supreme Court "leaves for another day the decision whether statements made by children

during interrogations conducted by forensic interviewers without police participation are testimonial." Appendix page 11. Other courts likewise have been reluctant to decide that all child statements made in such a multi-disciplinary setting are testimonial. *See People v. Sisavath*, 13 Cal. Rptr. 3d at 758 ("We have no occasion here to hold, and do not hold, that statements made in every MDIC interview are testimonial under *Crawford*.").

In light of such state court holdings, child advocacy centers face the dilemma of whether and how to adapt their protocols to minimize or eliminate law enforcement involvement to preserve the possibility that children's statements to interviewers would be considered "nontestimonial" and therefore admissible at trial if the child is eventually unavailable to testify. This problem is immediate and concrete because abused children commonly are found incompetent or emotionally unavailable to testify. Experts recognize that a child may not be available to testify "due to emotional or mental health reasons, pressures from family members to recant his allegations, or fear of facing the defendant." Amy Russell, *Best Practices in Child Forensic Interviews: Interview Instructions and Truth-Lie Discussions*, 28 Hamline Journal of Public Law and Policy 99, 130 n.160 (2006). If the law were more clear on what factors render a child's statements to be "testimonial," the counselors may be able to take statements about the abuse without setting up a Confrontation Clause challenge. The national importance of the child advocacy center movement

offers a compelling reason for the Court to grant certiorari in this case.

D. This case presents an excellent vehicle for clarifying the definition of "testimonial" as applied to child witnesses.

For several reasons, this case offers a prime opportunity for the Court to illuminate the meaning of "testimonial" as applied to child declarants, especially children reporting abuse to a private interviewer under circumstances which reveal both investigative and therapeutic purposes.

First, the case is not burdened by questions concerning the determination of unavailability. "Because the parties agree that J.G. is, tragically, 'unavailable,' and Bentley had no prior opportunity to cross-examine J.G., the admissibility of J.G.'s videotaped statements depends on whether they are 'testimonial' if offered against Bentley in this case." Appendix page 4.

Second, the record does not support a forfeiture argument. The respondent's brother, not the respondent, procured the victim's unavailability by killing her in advance of the sexual abuse trial. Accordingly, the Court faces the clean question of the testimonial nature of the child's statements.

Third, no procedural hurdles impede reaching the question presented. The respondent preserved the issue of his right to confront the deceased witness in

the trial court. The State properly challenged the trial court's exclusion of the evidence on discretionary review to the Iowa Supreme Court. The Iowa court's opinion stands solely on the federal Confrontation Clause; no adequate and independent state-law ground supports the decision. *See Michigan v. Long*, 463 U.S. 1032 (1983). The respondent's trial will not commence before this certiorari action is resolved because the prosecution stands or falls on the admissibility of J.G.'s statements. The State cannot avail itself of a harmless error argument.

Fourth, the realm of child assessment center interviews marks an ideal next step in the Court's jurisprudence defining "testimonial" statements. The work of these centers on behalf of abused children is progressive, widespread and important. Participants in the multi-disciplinary enterprise hunger for guidance on what factors may render a child's statements testimonial.

The hearing transcripts and exhibits in this case feature a detailed description of the origin, aims, protocol and actual operation of the St. Luke's Hospital Child Protection Center. Both the district court and the Iowa Supreme Court laud the work of the center and acknowledge the therapeutic purpose of the interview. These factual findings set in stark relief the legal questions whether a primary purpose test applies in this non-emergency context and whether the intent of the child declarant should be considered.

The certainty of the child's unavailability, the lack of a forfeiture issue and the strength of the record make the instant case a stronger prospect for review than the petition for certiorari in *Krasky v. Minnesota*, Sup. Ct. No. 07-7390, which presents a similar question and was pending before the Court at the time of this writing.

Finally, the facts of this case are typical. Law enforcement was involved with the child assessment interview to a greater extent than some cases and to a lesser extent than others. *Compare People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. App. 5 Dist. 2004) (statements found testimonial where district attorney and investigator attended interview at county facility) *with State v. Edinger*, 2006 WL 827412 (Ohio Ct. App. 2006) (statements found nontestimonial where police permitted to view child through closed circuit TV while she was making statement to social worker, but child was not made aware of police presence). J.G.'s chronological age of 10 and developmental age of seven or younger fall into the age groups most frequently served by child assessment centers. A decision addressing this common child abuse scenario would provide helpful precedent for the lower courts.

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CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

MARY TABOR
Assistant Attorney General
Counsel of Record
Hoover State Office Building
Des Moines, Iowa 50319
Telephone: (515) 281-5976
Fax: (515) 281-4902
E-mail: mtabor@ag.state.ia.us
Attorneys for Petitioner

739 N.W.2d 296

Supreme Court of Iowa.
STATE of Iowa, Appellant,
v.
James Howard **BENTLEY**, Appellee.
No. 06-1000.

Sept. 28, 2007.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, David C. Thompson, Benton County Attorney, Harold Denton, Linn County Attorney, and Nicholas Maybanks, Assistant Linn County Attorney, for appellant.

Thomas J. O'Flaherty of O'Flaherty Law Firm, North Liberty, for appellee.

Alice A. Phillips of American Prosecutors Research Institute, Alexandria, Virginia, for amicus curiae.

HECHT, Justice.

The issue presented in this interlocutory appeal is whether the videotaped statements of J.G., a ten-year-old child, are admissible under the Confrontation Clause of the United States Constitution at James Bentley's trial on sexual abuse charges. Because we conclude J.G.'s statements are testimonial, J.G. is unavailable to testify at trial, and Bentley had no opportunity for cross-examination, we affirm the district court's ruling that the videotaped statements are inadmissible under the Confrontation Clause.

I. Factual Background.

On November 16, 2004, J.G. was interviewed by Roseanne Matuszek, a counselor at St. Luke's Child Protection Center (CPC).[1] The interview was arranged by Officer Ann Deutmeyer, an investigator employed by the Cedar Rapids Police Department, and Pam Holtz, a representative of the Iowa Department of Human Services (DHS). Officer Deutmeyer and Holtz watched and listened to the interview through an "observation window." During the videotaped interview, J.G. made numerous statements alleging James Bentley sexually abused her. Bentley's brother murdered J.G. on or around March 24, 2005. Other facts relevant to the disposition of this appeal will be presented below in our analysis of the legal issue presented.

II. Procedural Background.

Two days after J.G.'s interview at the CPC, the Linn County Attorney charged Bentley with the crime of sexual abuse in the second degree, in violation of Iowa Code sections 709.1 and 709.3 (2003). Soon afterward, the Benton County Attorney filed similar charges against Bentley.

Bentley filed in both cases a motion for a preliminary determination of the admissibility of J.G.'s

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[1] Matuszek holds a Master's Degree in counseling and has interviewed nearly 3,000 children during her fourteen years of service at the CPC.

videotaped interview under the Confrontation Clause of the United States Constitution. The district court ruled admission of the videotape would not violate the Confrontation Clause. After we denied Bentley's application for review of that ruling, he filed a motion in limine seeking to prevent the videotape's admission at trial.

After a hearing on the motion in limine, the district court held admission of the videotape would violate Bentley's constitutional right to confront a witness against him.[2] The State filed an application for discretionary review, which we granted. We stayed the district court proceedings pending resolution of this matter.

III. Standard of Review.

We review de novo claims involving the Confrontation Clause. *State v. Hallum,* 606 N.W.2d 351, 354 (Iowa 2000).

IV. Analysis.

The Confrontation Clause of the United States Constitution guarantees to Bentley the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington,* 541

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[2] By agreement of the parties, the hearing and ruling on the motion in limine pertained to both the Linn and Benton County cases.

U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held tape-recorded statements police officers elicited during a custodial interrogation of the defendant's wife were inadmissible at the defendant's trial because they were testimonial, the declarant was unavailable at trial, and the defendant had no prior opportunity for cross-examination. 541 U.S. at 38-40, 68-69, 124 S.Ct. at 1357, 1374, 158 L.Ed.2d at 184-85, 203. The Court reasoned that the text and history of the Sixth Amendment support two inferences: (1) "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused"; and (2) "[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 50, 53-54, 124 S.Ct. at 1363, 1365, 158 L.Ed.2d at 192, 194. Because the parties agree that J.G. is, tragically, "unavailable," and Bentley had no prior opportunity to cross-examine J.G., the admissibility of J.G.'s videotaped statements depends on whether they are "testimonial" if offered against Bentley in this case. If the statements are testimonial, they are inadmissible against Bentley at trial; but if they are nontestimonial, the Confrontation Clause does not prevent their admission.

Prior to *Crawford,* the government bore the burden of proving constitutional admissibility in

response to a Confrontation Clause challenge. *United States v. Arnold,* 486 F.3d 177, 213 (6th Cir.2007) (Nelson Moore, J., dissenting) (citing *Idaho v. Wright,* 497 U.S. 805, 816, 110 S.Ct. 3139, 3147, 111 L.Ed.2d 638, 652 (1990); *Ohio v. Roberts,* 448 U.S. 56, 74-75, 100 S.Ct. 2531, 2543, 65 L.Ed.2d 597, 613 (1980)). It does not appear that *Crawford* altered this allocation of the burden of proof. *Id.* Accordingly, we conclude the government bears the burden of proving by a preponderance of the evidence that J.G.'s statements are nontestimonial.

The Court's view expressed in *Crawford* that the Framers intended the Confrontation Clause to preclude admission of "testimonial" statements made by unavailable witnesses who have not been subjected to cross-examination was based, in part, on the Confrontation Clause's express reference to "witnesses against the accused" – that is, to those who "bear testimony" against the accused, whether in court or out of court. *Crawford,* 541 U.S. at 51, 124 S.Ct. at 1364, 158 L.Ed.2d at 192 (internal quotation marks and citations omitted). One who "bears testimony" makes "[a] solemn declaration or affirmation . . . for the purpose of establishing or proving some fact." *Id.* (internal quotation marks and citations omitted).

The Court identified in *Crawford* "[v]arious formulations of th[e] core class of 'testimonial' statements" that the Confrontation Clause was intended to address: "*ex parte* in-court testimony or its functional equivalent," "extrajudicial statements . . . contained in formalized testimonial materials," and

"statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." *Id.* at 51-52, 124 S.Ct. at 1364, 158 L.Ed.2d at 193 (internal quotation marks and citations omitted). Although the Court did not offer a comprehensive definition of "testimonial statement," its opinion noted that even if a "narrow standard" is used to determine whether statements are testimonial, "[s]tatements taken by police officers in the course of interrogations," such as the declarant's statements in *Crawford,* are testimonial. *Id.* at 52, 124 S.Ct. at 1364, 158 L.Ed.2d at 193.

As the court noted in *Crawford,* "one can imagine various definitions of interrogation." 541 U.S. at 53 n. 4, 124 S.Ct. at 1365 n. 4, 158 L.Ed.2d at 194 n. 4. Using the term in its colloquial sense, as the court did in *Crawford, see id.,* we conclude the interview of J.G. was essentially a substitute for police interrogation at the station house. Representatives of the police department and DHS were present and participated in the interview. J.G. was informed at the outset of the conversation that a police officer was present and listening. The questions posed were calculated to elicit from J.G. factual details of the past criminal acts that Bentley had allegedly perpetrated against her. When the interview was concluded, the officer left the CPC with a videotaped copy of the interview which she considered evidence to be used against Bentley. The recorded interview conducted with the participation of a police officer is in our view a "modern practice[ ]

with closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford,* 541 U.S. at 68, 124 S.Ct. at 1374, 158 L.Ed.2d at 203.

Upon our de novo review, we conclude the government has not met its burden of proving the recorded statements of J.G. identifying Bentley as her abuser and describing his acts of alleged sexual abuse are nontestimonial. The extensive involvement of a police officer in the interview leads us to conclude J.G.'s statements were in effect "taken by [a] police officer[ ] in the course of [an] interrogation[ ]." *Crawford,* 541 U.S. at 52, 124 S.Ct. at 1364, 158 L.Ed.2d at 193.

A "community task force steering committee," which included some law enforcement personnel, organized the CPC. The record discloses a close, ongoing relationship has persisted between the CPC and representatives of local law enforcement agencies. The CPC acknowledges that one of its objectives is to provide centralized access to services, including law enforcement services. The police department's standard operating procedure calls for the referral of child victims of sexual abuse to the CPC for "forensic interviews." Law enforcement officials make continuing education workshops available to CPC employees, and Matuszek has attended such seminars.

Holtz and Officer Deutmeyer arranged the appointment for J.G.'s interview at the CPC. Immediately before and after J.G.'s interview, a "multidisciplinary team," which included Officer Deutmeyer,

met to discuss the case. Such meetings of CPC team members routinely include discussions of whether crimes have been committed against the child-interviewee and the identities of the perpetrators of those crimes.

Officer Deutmeyer confirmed that CPC interviews with children generally focus "on the alleged crime." In fact, the interview of J.G. in this case illustrates the typical CPC interview protocol. Matuszek briefly engaged in casual "rapport building" as the interview began, but the subject of her questions and J.G.'s answers soon shifted and focused primarily on the specific acts of sexual abuse Bentley allegedly perpetrated against J.G.

The participants in the interview have acknowledged that the interview served an investigative function for the State. Matuszek's written "patient interview report" described the interview as an "evidentiary interview." Officer Deutmeyer accurately described Matuszek's conversation with J.G. as a "forensic interview" and an "investigative tool." J.G. was informed of the involvement of the police department on three separate occasions during the interview. Matuszek opened the interview by telling J.G. a police officer and a DHS representative were listening on the other side of the observation window. When J.G. subsequently indicated she wanted to discontinue the interview, Matuszek specifically implored J.G. to continue because "it's just really important the police know about everything that happened." At a later point in the interview,

Matuszek encouraged J.G. to provide additional details because the police were "probably going to want to know just a little bit more" about the arrangement of Bentley's apartment, where some of the alleged acts of sexual abuse occurred.

Officer Deutmeyer's involvement in the interview was not limited to mere observation. Toward the end of the interview, Matuszek told J.G. she was going next door to talk with the police officer and a representative of DHS about whether she "forgot to ask . . . some questions." When she returned to the interview room, Matuszek asked J.G. additional specific questions about Bentley's conduct. According to Officer Deutmeyer, questions posed to the interviewee after such mid-interview consultations between CPC staff and representatives of law enforcement are typically directed toward obtaining more "specific information because the child has given [the police] enough to believe that a crime has been committed," but the police need more evidence to substantiate the allegations and decide what course to pursue in future investigations. After J.G.'s interview, the CPC followed its protocol by giving a copy of the tape to Officer Deutmeyer. The tape of the interview was marked as "evidence" and placed in the police department's evidence storage room. These factual circumstances make it objectively apparent that "the purpose of the [recorded interview] was to nail down the truth about past criminal events." *Davis v. Washington,* 547 U.S. ___, ___, 126 S.Ct. 2266, 2278, 165 L.Ed.2d 224, 242 (2006).

Indicia of "formality" surrounding J.G.'s statements reinforce our determination that J.G.'s statements were the product of a police interrogation. J.G. spoke in a calm environment responding to a series of structured questions posed by Matuszek. The statements constituted a historical account of past events, deliberately provided in response to questioning regarding past events. The statements were made in an environment designed and equipped to facilitate forensic interviews calculated to collect evidence against those suspected of abusing children. As we have already noted, the interview room included an observation window that enabled police officers to watch and participate in the interview, and video equipment that was used to make a record of the interview for use by law enforcement officers.

The State asserts J.G.'s statements are nontestimonial because a reasonable child of J.G.'s chronological age (10) and functional age (7) would not have understood her statements would be used to prosecute the defendant. We conclude, however, an analysis of the purpose of the statements from the declarant's perspective is unnecessary under the circumstances presented here. J.G.'s testimonial statements lie at the very core of the definition of "testimonial," and fall within the category of *ex parte*

examinations against which the Confrontation Clause was directed.[3]

We also reject the State's assertion that Bentley's right to confrontation in this case should yield to the interests of J.G. and the State because the Confrontation Clause is not inflexibly applied. The United

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[3] We leave for another day the decision whether statements made by children during interrogations conducted by forensic interviewers without police participation are testimonial. As in *Crawford*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 and *Davis*, 547 U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224, our holding today makes it unnecessary to decide whether and when statements made to someone other than law enforcement personnel are "testimonial." Courts addressing this question have reached disparate conclusions. *Compare United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir.2005) (child sex abuse victim's videotaped statements made to a forensic interviewer were testimonial); *Rangel v. State*, 199 S.W.3d 523, 533-36 (Tex.App.2006) (child's statements made two months after alleged abuse to child protective services investigator were testimonial); *State v. Buda*, 389 N.J.Super. 241, 912 A.2d 735, 745-46 (2006) (child's statements to government-employed social worker were testimonial); *State v. Hopkins*, 137 Wash.App. 441, 154 P.3d 250, 257-58 (2007) (same), *with People v. Geno*, 261 Mich.App. 624, 683 N.W.2d 687, 692 (2004) (statement to director of children's assessment center was nontestimonial because the interrogator was not "a government employee"); *State v. Bobadilla*, 709 N.W.2d 243, 254-56 (Minn.2006) (child's statements to protective service worker during risk assessment interview were nontestimonial); *State v. Sheppard*, 164 Ohio App.3d 372, 842 N.E.2d 561, 566-67 (2005) (statement to private clinical counselor in mental health interview was nontestimonial); *Commonwealth v. Allshouse*, 924 A.2d 1215, 1222-24 (Pa.Super.Ct.2007) (child abuse victim's statements to county youth services caseworker at the child's home were nontestimonial).

States Supreme Court has concluded that "[a] State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Maryland v. Craig*, 497 U.S. 836, 853, 110 S.Ct. 3157, 3167, 111 L.Ed.2d 666, 683 (1990). In *Craig*, the Court held the Confrontation Clause does not "categorically prohibit[]" testimony via closed circuit television by a child victim of sexual abuse if in-court testimony would be traumatic for the child. *Id.* at 840, 110 S.Ct. at 3160, 111 L.Ed.2d at 675. Although *Craig* does stand for the proposition that the circumstances of the confrontation may be modified to protect children, it does not support the State's assertion that the right of confrontation may be dispensed with altogether if the declarant is a child. In *Craig*, the child victim testified under oath during trial and was subjected to cross-examination through closed-circuit television. The circumstances in the case now before the court are quite different, as J.G. is deceased and therefore unavailable to testify against Bentley, who has no opportunity to subject J.G.'s recorded statements to cross-examination. Bentley's right to confront a witness against him need not yield to the State's interest under the circumstances of this case.

Our conclusion that J.G.'s statements are testimonial is consistent with the decisions of other courts. *L.J.K. v. Alabama*, 942 So.2d 854, 861 (Ala.2005) (statements of four-year-old and six-year-old children to a state-employed child abuse investigator were

testimonial); *T.P. v. State,* 911 So.2d 1117, 1123 (Ala.Crim.App.2004) (child's statements to a social worker in the presence of a police investigator were testimonial); *People v. Sisavath,* 118 Cal.App.4th 1396, 13 Cal.Rptr.3d 753, 757-58 (2004) (child's statement to interview specialist at a private victim assessment center, made in the presence of the prosecuting attorney and district attorney's investigator, was testimonial); *People v. Sharp,* 155 P.3d 577, 579-82 (Colo.Ct.App.2006) (five-year-old's videotaped interview with private forensic interviewer was testimonial where a police detective arranged the interview and interviewer asked questions requested by the detective); *In re Rolandis G.,* 352 Ill.App.3d 776, 288 Ill.Dec. 58, 817 N.E.2d 183, 188 (2004) (statements to private child abuse investigator while police officer watched through one-way glass were testimonial); *State v. Henderson,* 160 P.3d 776, 789-90 (Kan.2007) (statements made by child sexual abuse victim to social worker and police detective were testimonial); *State v. Snowden,* 385 Md. 64, 867 A.2d 314, 325 (2005) (child sex abuse victims' statements during interview with DHS sexual abuse investigator arranged by police detective were testimonial); *Flores v. State,* 121 Nev. 706, 120 P.3d 1170, 1178-79 (2005) (statements made by a child describing child abuse to police investigator and child protective services worker were testimonial); *State v. Blue,* 717 N.W.2d 558, 564 (N.D.2006) (statements to private forensic interviewer working "in concert with or as agent of" the police were testimonial); *State v. Mack,* 337 Or. 586, 101 P.3d 349, 352-53 (2004) (statements made by

three-year-old during interviews with DHS caseworker were testimonial, where police officers arranged the interviews as a substitute for police interrogation, were present during the interviews, and videotaped them); *State v. Pitt,* 209 Or.App. 270, 147 P.3d 940, 944-45 (2006) (statements made to private forensic child interviewer while police officer videotaped interview through one-way glass were testimonial), *opinion adhered to on reconsideration* at 212 Or.App. 523, 159 P.3d 329 (2007); *In re S.R.,* 920 A.2d 1262, 1264 (Pa.Super.Ct.2007) (child sex abuse victim's statements made to a forensic interview specialist while police officer watched through one-way glass were testimonial).

We credit the State's assertion that the CPC performs very important and laudable services in furtherance of the protection of children. The child-friendly CPC facility includes a waiting room and play area with toys, games, books, a fish aquarium, and a television. The interview room includes drawing supplies and is equipped to maximize children's comfort. It is beyond dispute that information gathered from J.G. in such a child-friendly, safe environment could have been very useful in the treatment of her well-documented psychological conditions. The work of the CPC and the team of professionals who took J.G.'s statement is not impugned by our characterization of J.G.'s statements as "testimonial." The actors were doing important work intended to investigate past alleged crimes and prevent future crimes. Although one of the significant purposes of the interrogation was

surely to protect and advance the treatment of J.G., as we have discussed above, the extensive involvement of the police in the interview rendered J.G.'s statements testimonial. Therefore, the district court correctly ruled the admission of the statements would violate Bentley's rights under the Confrontation Clause under the circumstances of this case.

V. Conclusion.

Bentley's right to confront witnesses against him is an essential constitutional right, and we must be vigilant in guarding against its erosion. On this point, we share the opinion of Chief Justice Marshall, who wrote:

> I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so important.

See Crawford, 541 U.S. at 73, 124 S.Ct. at 1377, 158 L.Ed.2d at 206 (Rehnquist, J., concurring) (quoting *United States v. Burr,* 25 F.Cas. 187, 193 (C.C.Va.1807) (No. 14,694)). Under the circumstances of this case, the district court correctly concluded J.G. was a witness who bore testimony against Bentley in the recorded interview. Because Bentley has no opportunity to cross-examine J.G., the admission of her testimonial statements would violate Bentley's

right to confront witnesses against him. We therefore affirm the district court's ruling.

AFFIRMED.

IN THE IOWA DISTRICT COURT
IN AND FOR BENTON COUNTY

STATE OF IOWA, Plaintiff, vs. JAMES HOWARD BENTLEY, Defendant.	)	No. FECR009460

IN THE IOWA DISTRICT COURT
IN AND FOR LINN COUNTY

STATE OF IOWA, Plaintiff, vs. JAMES HOWARD BENTLEY, Defendant.	)	No. FECR058905

RULING ON EVIDENTIARY MOTIONS

(Filed Jun. 12, 2006)

Hearing was held at the Linn County Courthouse on the combined Motions in the above-entitled cases. The State was represented in the Benton County matter by County Attorney David Thompson, and in the Linn County matter by County Attorney Harold Denton and Assistant County Attorney Nicholas Maybanks. The Defendant was personally present with his Attorney, Mark Brown. Evidence was presented

concerning the Defendant's Motion in Limine (Child Protection Center videotape) and the State's Motion for Preliminary Determination (Testimony of Laura Sundell). Witnesses who testified at the hearing were Cedar Rapids police investigator Ann Deutmeyer, St. Luke's Hospital Child Protection Center Executive Director Susan Tesdahl, Child Protection Center Interviewer Rosanne Matuszek, and Licensed Social Worker and Play Therapist Laura Sundell. The parties also offered and the court received the videotape of the Child Protection Center interview of Jetseta Gage and the report of Investigator Matuszek. The Benton County Attorney advised that he would prepare and file a Minute of Testimony for Laura Sundell including and incorporating her discovery deposition. The Defendant is scheduled to be tried to a jury in Clarke County, Iowa, commencing on July 10, 2006, in the Benton County matter and commencing on August 14, 2006, in the Linn County matter.

This hearing had a two-fold purpose. First, more than thirteen months had passed since the admissibility of the Child Protection Center videotaped interview of Jetseta Gage was considered by Judge Koehler. During the intervening period, several cases from various jurisdictions have issued interpreting the United States Supreme Court ruling in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). In addition, new counsel has been appointed to represent the Defendant and additional information and evidence has been identified which was not presented during the prior hearing. Second,

the State has identified newly discovered evidence in the form of the testimony of Laura Sundell which it wishes to offer in each prosecution. Because of the similarity in legal issues between the Child Protection Center videotape and the interviews by Laura. Sundell, all of the evidence was presented for review by the court.

Findings of Fact

Jetseta Gage was born on August 25, 1994, and was murdered by the Defendant's brother, Roger Bentley, on or about March 24, 2005. Based upon reports made by the child to friends, family and authorities, the Defendant was charged with Sexual Abuse in the Second Degree in each of the respective counties. The Trial Information was filed in Linn County On December 6, 2004, and in Benton County on February 24, 2005. The Linn County file reflects that the Defendant obtained a continuance of trial pursuant to his motion and an order by the Honorable Larry Conmey on March 10, 2005. The court file also reflects that Jetseta Gage was served with a subpoena on March 4, 2005, for her examination by the Defendant's attorney in a discovery deposition scheduled for March 14, 2005. No evidence was presented on this subject, but the court infers from the circumstances that the discovery deposition was not held as scheduled because of the trial continuance order. Based upon all of the circumstances described herein, the court concludes that Jetseta Gage is an unavailable witness and, as will be discussed later in

this ruling, the court cannot conclude whether the Defendant had an opportunity to confront Jetseta Gage as a witness against him.

On November 16, 2004, Jetseta Gage was interviewed at the St. Luke's Hospital Child Protection Center (CPC) by interviewer Rosanne Matuszek. Also present and observing the interview from the observation room adjacent to the interview room were Cedar Rapids Police Investigator Ann Deutmeyer, and Department of Human Services assessor Pam Holtz. Jetseta was brought to the CPC by a family member. The initial referral to the CPC for the interview was by DHS Assessor Pam Holtz. The entire interview was videotaped in conformity with the protocol of the CPC. During the interview, Jetseta was questioned about her understanding of the concept of truthfulness and her understanding of basic anatomy. The interview included a standard phase of establishing the child's concept of the CPC and her safety in that setting. The videotape of the interview demonstrates the nature of the questions asked by Investigator Matuszek and the answers given by Jetseta. Prior to the completion of the interview, Matuszek, Deutmeyer and Holtz met to identify additional questions which Deutmeyer and/or Holtz requested in addition to the interview which had already been conducted. Additional questions were asked and the interview was completed. A copy of the videotape was kept at the CPC and the second copy was taken by Investigator Deutmeyer and kept at the Cedar Rapids Police Department. Dr. Kathleen

Opdebeeck performed a physical examination of the child for purposes of medical diagnosis, treatment and/or referral before she left the CPC. Following the interview and medical examination, the multi-disciplinary team, including the investigator, assessor and interviewer, met to review the results of the interview and examination and to make determinations concerning further action. As a result, a criminal complaint was filed in Linn County on November 18, 2004, Department of Human Services child protection actions were initiated and Jetseta was referred for mental health treatment and therapy. Interviewer Matuszek subsequently prepared a report of her interview and referred to the CPC activity as an "evidentiary interview and medical exam." All of the witnesses agreed that the CPC interview is a substitute for a law enforcement interview for various excellent reasons. Investigator Deutmeyer described the interview tape recording as an "investigative tool". At no time during the interview was the child advised of any possible or intended use of the video tape as a prosecution tool or as an exhibit in a criminal case. Finally, there was no discussion of Jetseta being a witness or being required to testify in any criminal proceeding.

The St. Luke's Hospital Child Protection Center has been in operation for nineteen years. During that time over 23,000 children have been interviewed at the CPC from a fifty-four county area in eastern Iowa. The majority of the children have been referred to the CPC from Linn County. Of the children interviewed,

80 percent were reviewed because of suspicions or reports of sexual abuse. Of the 23,000 referrals, 42 percent were "founded" in the sense used by the Department of Human Services. CPC Director Susan Tesdahl could not provide an accurate percentage or number of the referrals which resulted in criminal prosecutions. The mission as identified in the Mission Statement of the CPC is the safety and protection of children. The staff at the Center includes interviewers, the medical director and nursing staff in addition to the executive director. Referrals are typically received from the Department of Human Services, local law enforcement and area physicians. The forensic interview conducted at the Center is substituted for the law enforcement interview because of specialized training of the interviewer and to avoid repeated interviews which tend to re-victimize the minor children. The protocol of the CPC is a multidisciplinary approach to child welfare. It includes the three components of child protection, law enforcement and medical diagnosis and treatment. Funding for the CPC is underwritten by St. Luke's Hospital with funding provided by grants from the Iowa Department of Justice, the Iowa Department of Public Health and the National Children's Alliance. In addition, private contributions and donations as well as insurance coverage for individuals rounds out the funding for the Center's operations.

The CPC operates on a well-defined and strictly followed protocol for each "psychosocial assessment" or interview. An appointment is made on behalf on

the child pursuant to a formal referral from one of the sources described previously. The child is then registered as a patient. The interview may proceed or follow the medical examination, both of which are conducted at the CPC site. The interview is conducted by the trained CPC interviewer with the DHS assessor and the law enforcement officer observing from an observation room through a one-way glass or mirror. The entire interview is videotaped and preserved with one copy remaining at the CPC and the other copy being delivered to the law enforcement officer. Prior to the interview a team meeting is conducted among the interviewer, assessor and investigator. Following that pre-interview meeting, the team meets with any parent or guardian who accompanied the child to the Center. That person is not permitted to observe or participate in the interview, in any way. The medical director or her designee conducts a medical examination and interview either before or after the forensic interview. Following the interview, the multidisciplinary team meets once again to determine several questions. First, is the child safe? Second, was the child abused? Third, what should be done to protect the child and to deal with the abuse? The DHS assessor is a participant and focuses on the safety of the child and the law enforcement investigator focuses upon any follow-up criminal investigation. During the course of the interview, a set procedure is followed to assure reliability and accuracy. The child is engaged in a conversation to assess the child's, stage of development and understanding of terms. The child is assured of the safety of the place and

interview and reassured that they can tell what, if anything, has happened to them. The child is advised that the interview is videotaped and that there are other official persons observing the interview from behind the mirror. Prior to the completion of the interview, a conference is held among the interviewer, assessor and investigator to determine whether any further questions should be asked for the benefit of any one of them. Generally, any further child protection or criminal prosecution is handled by the respective participants or specialists to whom the child has been referred. It is common for the interviewer, assessor and investigator to be listed as potential witnesses in any criminal prosecution which may result.

Cedar Rapids Police Investigator Deutmeyer testified that she had been involved in similar investigations and interviews for the four years that she was the sex abuse investigator at the Cedar Rapids Police Department. She was involved in between 200 and 400 cases per year, many of which involved children and interviews at the CPC. She was familiar with and followed the CPC protocol for forensic interviews and considered gathering evidence for court as one of the objectives of the process. She characterized the interview videotape as an "investigative tool" and testified that it was used both by police officers and the county attorney. Finally, she testified that the interview by the CPC Interviewer was a substitute for the law enforcement interview.

Laura Sundell is a licensed social worker with a B.A. and M.S.W. from the University of Iowa. She has been a child play therapist for a number of years and has worked at the Cedar Centre and St. Luke's Family Counseling Center prior to her private practice. Ms. Sundell was providing therapy to Jetseta Gage as a result of a referral from psychiatrist, Dr. Castillo. Ms. Sundell was working with Jetseta because of many behavioral and developmental problems the child was exhibiting. The play therapy sessions lasted from 45 to 60 minutes per session on a virtually weekly basis. Other specialists were also helping the child with her developmental problems which were described at the hearing. Based upon her substantial education and experience, Ms. Sundell expressed the opinion that Jetseta was "several years younger" than her biological age and was a "seven year old" in development. She also described the child as impulsive with difficulty following directions. Ms. Sundell works with 20 to 30 children per week on a current basis and has had substantial experience over the years working with children in this setting. Ms. Sundell's work with Jetseta was entirely focused on behavior and medical issues. There had been no contact or communication between Ms. Sundell and law enforcement until February, 2006, when Benton County Attorney Thompson contacted her about any possible information she might have.

Ms. Sundell testified that Jetseta did not initially reveal that she was the victim of sexual abuse but did ultimately reveal that she had been victimized and

that she had been afraid to reveal that information earlier. Ms. Sundell compared those revelations with the four to five children per week with whom she works who are sex abuse victims. She testified that it is common for child sex abuse victims to initially fail to disclose the abuse and that there are various reasons for the initial withholding of that information. Finally, Ms. Sundell expressed the opinion that Jetseta's statements to her about sex abuse were truthful and consistent with her prior statements. In addition, her initial failure to disclose the abuse was consistent with behavior by children who have been sexually abused. There was no evidence to support any conclusion that statements by Jetseta to Ms. Sundell were intended for prosecution or court use, either by Ms. Sundell or Jetseta. In addition, no law enforcement agency or any other agency had made any attempt to use the play therapy information for court purposes prior to February, 2006. The sole purpose of the interviews and statements made were for therapy and treatment.

Conclusions of Law

The United States Supreme Court turned the analysis of hearsay admissibility in criminal cases on its head with its opinion in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). The admissibility of hearsay statements in criminal cases had been a familiar and comfortable exercise based upon the Supreme Court holding in *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597

(1980). By abrogating the decision in *Ohio v. Roberts,* the *Crawford* Court switched the focus from hearsay rule analysis and reliability in all cases to a two-tiered process of Sixth Amendment Confrontation Clause analysis. The remaining discussion in these conclusions of law will deal with the holding in *Crawford,* id., and the eases or rules representing the analysis required by *Crawford.,* id.

Ohio v. Roberts and the Iowa Rules of Evidence, Iowa Court Rules 5.801, et seq., follow a traditional analysis of reliability and almost universally accepted exceptions to the hearsay role. *Crawford v. Washington,* eliminates *Roberts,* as authority except in the second stage of analysis.

Crawford v. Washington, resurrects the supremacy of the Sixth Amendment's Confrontation Clause over any hearsay statements by witnesses which were admissible under exceptions to the hearsay rule. *Crawford* does not preclude the admissibility of extra-judicial statements by witnesses testifying at trial. The premise upon which *Crawford* is based is found in the following quote from page 42: "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." This is otherwise known as the Sixth Amendment's Confrontation Clause and has been applied to State as well as Federal prosecutions. *Pointer v. Texas,* 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965). The Supreme Court in *Crawford* summarized its position at page 50 as follows:

"First, the principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidenced against the accused. * * *

Accordingly, we once again reject the view that the Confrontation Clause applies of its own course only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon the 'law of Evidence for the time being. (citation omitted) Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court. This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An offhand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." * * *

"Testimony," in turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Ibid. An accuser who makes a formal statement to government officers bears testimony

> in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement."

The Supreme Court further explained its analysis as follows: "The historical record also supports a second proposition: That the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the Defendant had had a prior opportunity for cross-examination." The court then launched into a discussion of Confrontation Clause application to "testimonial" versus "non-testimonial" hearsay. What is unmistakably clear from *Crawford,* is that questioning of a witness by a police officer, magistrate or other law enforcement official is testimonial and is excluded by the Confrontation Clause if the witness was not available at trial and the Defendant had had no prior opportunity to cross-examine. Perhaps fearing unintended consequences, the Supreme Court specifically refused to define testimonial statements versus non-testimonial statements. Nor did the Supreme Court clarify exactly what was meant by the phrase "opportunity for cross-examination." Even though non-testimonial statements were not defined, the court made it clear that such non-testimonial statements could be admissible under a *Roberts,* analysis for reliability and hearsay exception application.

Two members of the court concurred in the judgment but dissented from the decision to overrule *Ohio v. Roberts,* id. To their challenge that the decision was not supported by reasoning or history, the majority in footnote 7 stated the following: "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." At page 57, the court said. "we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial." (citation omitted.) The court further explains at page 59 "our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the Defendant has had a prior opportunity to cross-examine." To clarify, the court went on to state: "Finally, we reiterate that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." In condemning the test under *Roberts v. Ohio,* the court stated at page 62: "The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability". The Court characterizes reliability as "an

amorphous if not entirely subjective, concept." As a parting shot, the Supreme Court stated "we leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."

Cases following *Crawford v. Washington,* id., in which various courts have attempted to apply the new standard, include: *United States v. Bordeaux,* 400 F. 3rd 548, (8th Cir. 2005); *U.S. v. Peneaux,* 432 F. 3rd 882 (8th Cir. 2005); *State v. Scacchetti,* 690 N.W.2d 393 (Minn. Ct. App. 2005); *People v. Sisavath,* 118 Cal. Rptr. 4th 1396 (Cal. Ct. App. 2004); *State v. Bobadilla,* 709 N.W.2d 243 (Minn. Ct. App. 2004); *State v. Newell* 710 N.W.2d 6 (Iowa 2006); *State v. Kalar,* No.5-220/05-0298 (Iowa Ct. App. 2006); and *State v. Williams,* 695 N.W.2d 23 (Iowa 2005). The common theme among all of these cases is the attempt by the respective courts to define, apply or interpret the concept of non-testimonial or testimonial statements. Some of the cases bear strong factual relationships to the instant case. The *Kalar* case fails to apply the testimonial statement test and moves directly to a second stage analysis of reliability upon an apparent assumption that the statement is non-testimonial. It is remarkable that the various courts apply a subjective analysis to the factual circumstances in determining

whether the statement was or was not testimonial. Because these various decisions apply a subjective test to the concept of testimonial statements, this court chooses to apply *Crawford v. Washington,* id., directly rather than attempt to apply potentially wrong conclusions reached by other courts.

State v. Rojas, 524 N.W.2d 659 (Iowa 1997), is a case in which the child witness testified at trial but recanted her original allegations of sexual abuse committed against her by that Defendant. The trial court admitted the pretrial videotaped interview of the child by a social worker pursuant to Rule of Evidence 803(24). The Supreme Court affirmed the conviction and trial court's ruling by applying the *Ohio v. Roberts* trustworthiness test and the residual exception to the hearsay rule. *Rojas* is not applicable to the confrontation clause analysis because the child testified at the trial. There is no finding that the child was unavailable and it was clear that she was available for cross-examination. *Rojas* is applicable to the evaluation of reliability in the event that the proffered statement is "non-testimonial."

State v. Tornquist, 600 N.W.2d 301 (Iowa 1999), is important in considering statements made to Laura Sundell. *Tornquist,* id., provides that extra-judicial statements to a licensed social worker could qualify as admissible under the medical diagnosis or treatment exception to the hearsay rule, 5.803(4). See also *State v. Hildreth,* 582 N.W.2d 167 (Iowa 1998) and *State v. Tracy,* 482 N.W.2d 675, 682 (Iowa 1992). The key factors in analyzing admissibility were the

experience of the licensed social worker and whether the information received by the social worker was "for purposes of diagnosis or treatment and that [the information] may assist in diagnosis or treatment of that disorder." *State v. Tonquist,* at 306.

Decision

Several issues demand close scrutiny in determining whether these extra judicial statements are admissible. First, it was suggested during the hearing that the video taped statement at the CPC should be admissible because the primary purpose or goal of the CPC mission is protection of the child. Thus, the question is whether the primary purpose is all important or whether secondary purposes can trigger exclusion under the Confrontation Clause. This court accepts as true and laudable Sue Tesdahl's testimony concerning the primary mission of the CPC. However, the facts clearly support the conclusion that at least three goals are included in the mission statement, one of those goals being criminal prosecution. It cannot be understated that all three of the goals of the mission statement are important. It is similarly clear that the law enforcement perspective includes all three goals but is focused upon potential criminal prosecution. Under the clearly defined protocol of the CPC in conjunction with the policies and procedure of the Cedar Rapids Police Department, it is clear that the CPC interviewer is a surrogate for the police investigator. Even though that relationship must render the statement in this case a testimonial

statement, the protocol and the policies and procedures should not change because of *Crawford v. Washington,* id. Of the cases which result in criminal prosecution, only a small percentage involve a witness unavailable at trial who had not been subject to the opportunity for cross-examination.

As long as the role of the interviewer as a surrogate law enforcement officer is significant, it is irrelevant whether the role is primary or secondary. This is true, in part, because to conclude otherwise invites pretextual determinations of primacy. The Supreme Court test makes the CPC interviewer a surrogate for law enforcement just as law enforcement was a surrogate for 18th Century magistrates.

Second, several state courts have applied a subjective test to the determination of testimonial versus non-testimonial statements. This begs the question whether the analysis should be subjective or objective. Those courts tend to focus on the perception of the child and whether the child is making statements with anticipation that the statements would be used in court. To use that focus is to create a child witness exception to the Confrontation Clause. That type of analysis really has nothing to do with the Confrontation Clause and everything to do with the reliability of the statement. It is a return to the subjective analysis of *Roberts v. Ohio*, id, abrogated by the Supreme Court. When the focus is placed upon perception of the witness or even intent of the interviewer, subjective fictions characterizing the interview result. The test cannot be whether the witness

understood the potential use of the interview. The logical extension of such a principle would be to conclude that the interview of a very young child by police officers with a specific purpose of criminal prosecution would be non-testimonial because the child would not have the sophistication to understand the process. Although less clear, it is also wrong to focus on the purpose or intent of the investigator. In this case, the interview followed a clearly defined and always followed protocol. Part of that protocol was the preservation of the interview on videotape and providing a copy to law enforcement. It cannot be argued that law enforcement would sometimes choose to use the videotape and sometimes not. To not use the videotape might suggest that the videotape contains exculpatory information beneficial to the Defendant. Consequently, the act of preserving the interview on videotape and the potential for its use by law enforcement or prosecution renders the videotape testimonial, No subjective or objective analysis can alter that obvious result. A more appropriate analysis is whether the information is known to and routinely made available to law enforcement than to try to discern intent or purpose from the preservation.

Focusing on the ability of the witness is also a red herring. To determine admissibility upon the level of sophistication or knowledge of the witness could lead to absurd results. It should be unnecessary to fully analyze this proposition in light of previous discussion.

Crawford v. Washington, id., has turned hearsay admissibility on its head in criminal cases. This is because statements which in absolute terms may be far more reliable will be inadmissible under the Confrontation Clause test. Conversely, statements which are far less reliable but which are non-testimonial may be admissible simply because they exceed a minimum threshold of reliability. For example, the videotaped and preserved interview at the CPC by a highly-trained and experienced interviewer whose primary interest is welfare or protection of the minor child is inadmissible while offhand remarks to a bystander under certain circumstances may be admissible because they are non-testimonial and minimally reliable.

Within the framework of case law in the state of Iowa, *Crawford v. Washington* id., creates little change in the admissibility of extra-judicial videotaped statements in child sexual abuse cases. A review of the cases applying Rule 5.801(d)(1) shows limited admissibility of such videotape evidence even when the witness testifies at trial. Of the Iowa Supreme Court decisions in which the question of Rule 5.803(24) was invoked, only a few opinions would have been different under *Crawford.*

In light of the explicit inclusion of police interviews within the definition of testimonial statement by the United States Supreme Court, it must be concluded that the tape recorded interview of Jetseta Gage is inadmissible.

What was not addressed in the evidence at the hearing nor was it defined by the United States Supreme Court was the issue of the unavailability of the witness and "the Defendant had had a prior opportunity for cross-examination." Does that phrase mean the statement is inadmissible even if the Defendant could have discovered the testimony of the witness and subjected her to cross-examination? If defense counsel had actually deposed Jetseta Gage on March 14, 2005, would that deposition have been the "prior opportunity for cross-examination"? Or, conversely, could the Defendant have specified that the deposition was strictly for discovery purposes and not available for any other purpose at the time of trial? Or, could the Defendant avoid admissibility by refusing to depose the victim? The factual record and cited authority are insufficient to answer these questions. In this case, there was no discovery deposition and no examination. In light of the lack of authority on this particular subject, the court merely raises these issues because the potential exists. Had the prosecution initiated a testimonial event which would have forced upon defense counsel the testimony of the witness and the opportunity for cross-examination, the answer might be different. The problem with such an aggressive prosecution tactic is that it tends to revictimize the child and destroys one of the protections of the CPC protocol.

Finally, there is the remaining admissibility issue of the statements to Laura Sundell. Laura Sundell had no relationship with law enforcement or

prosecution and had received no contact from anyone associated with either until February, 2006. All of the statements by Jetseta Gage to Laura Sundell were offered within the context of diagnosis, therapy and treatment. Finally, Ms. Sundell, using her substantial training and experience, concluded that the statements of Jetseta Gage were reliable. In addition, they were consistent with reports to other, e.g., the CPC interview. Under the analysis of *Crawford v. Washington.*, id., the statements are non-testimonial. Based upon those same factors, the statements to Laura Sundell are admissible under Iowa Court Rule 5.803(4) and 5.803(24) and *State v. Rojas,* 524 N.W.2d 659 (Iowa 1997).

For the reasons stated herein, the videotape of the interview at the St. Luke's Child Protection Center is inadmissible pursuant to the Confrontation Clause of the Sixth Amendment of the Constitution of the United States, and the statements to play therapist Laura Sundell are admissible unless excluded upon other grounds.

DATED: June 9, 2006. Clerk to notify.

/s/ Denver D. Dillard
DENVER D. DILLARD,
Judge of the Sixth Judicial District of Iowa

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY/BENTON COUNTY

THE STATE OF IOWA,	) Linn County
Plaintiff,	) No. FECR058905
	) Benton County
vs.	) No. FECR009460
JAMES HOWARD BENTLEY,	) RULING
Defendant.	) (Filed May 20, 2005)

The Motion for Preliminary Determination of Admissibility Pursuant to Iowa Rule of Evidence 5.104 filed by Defendant James Howard Bentley was heard, by the undersigned on May 11, 2005. Linn County Attorney Harold Denton, Assistant Linn County Attorney Nick Maybanks, and Benton County Attorney David Thompson appeared on behalf of the State of Iowa. Attorney David Fiester appeared on behalf of the Defendant James Howard Bentley. Defendant James Howard Bentley was present at the hearing. The Court received the testimony of witness Rosanne Matuszek and admitted into evidence State's Exhibits 1 and 2.

After considering the parties' arguments, written briefs, exhibits, the file and relevant law, the Court now enters the following ruling.

FINDINGS OF FACT

Defendant James Howard Bentley is charged with Second Degree Sexual Abuse in violation of Iowa Code §§ 709.1 and 709.3. He is accused of sexually abusing a ten-year-old female in Cedar Rapids, Iowa, between January 1, 2002 and November 17, 2004, and in Benton County, Iowa, between the months of October and November 2004.

On or about April 6, 2005, Defendant filed a Motion for Preliminary Determination of Admissibility Pursuant to Iowa Rule of Evidence 5.104. The Motion stems from the following facts: On November 16, 2004, the alleged victim, J.G., a minor child then ten years of age, was interviewed at St. Luke's Child Protection Center. The Center provides centralized services for children when there are allegations of abuse, thereby preventing a child from being reinterviewed more than one time by multiple agencies. The lead interviewer at the Center, Rosanne Matuszek, conducted the interview. Investigator Ann Deutmeyer of the Cedar Rapids Police Department and Pam Holtz of the Department of Human Services observed the interview. In the interview, J.G. reported the acts of sexual abuse Mr. Bentley allegedly committed against her. J.G. died in March 2005. The November 16, 2004 interview was videotaped, and the State intends to introduce the videotape at trial as part of its case-in-chief against Mr. Bentley. Mr. Bentley argues that allowing the videotape into evidence constitutes a violation of his Sixth Amendment right to confront his accuser under *Crawford v. Washington,* 541 U.S.

36 (2004) because J.G. is not available to testify at trial, and he did not have an opportunity to cross examine her. The State argues that the rule announced in *Crawford* does not apply to bar admission of the videotaped interview because J.G.'s statements during the interview were not testimonial.

CONCLUSIONS OF LAW

I. Confrontation Clause

The Sixth Amendment's Confrontation Clause assures: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Sixth Amendment was incorporated and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 406 (1965). The United States Supreme Court recently re-examined its Confrontation Clause jurisprudence in *Crawford* where it considered the reliability test of *Ohio v. Roberts,* 448 U.S. 56, 66 (1980): "an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability – i.e., falls within a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" *Crawford,* 541 U.S. at 42 (quoting *Roberts,* 448 U.S. at 66).

In *Crawford,* the Court engaged in a historical analysis of the clause and concluded the history supports two inferences regarding the meaning of the Sixth Amendment: 1) "the principal evil at which the

Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused;" and 2) the "framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 50-54. These two inferences led the Court to overrule the aforementioned *Roberts* test. *Id.* The new Confrontation Clause rule announced in *Crawford* states that testimonial statements of witnesses absent from trial are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. In this case, the deceased declarant, J.G., is unavailable for trial, and Mr. Bentley did not have an opportunity to cross-examine her. Therefore, the issue before the Court is whether J.G.'s statements in the November 16, 2004 videotaped interview were "testimonial."

A. Whether J.G.'s statements were "testimonial"?

The Court in *Crawford* declined to provide an exact definition of "testimonial," stating; "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. The Court did impart the following guidance;

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former

> trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

The Court also provided; "'Testimony' . . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51 (quoting, 1 N. Webster, An American Dictionary of the English Language (1828)). Pursuant to this definition, the Court explained that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text . . . reflects an especially acute concern with a specific type of out-of-court statement." *Id.* Three formulations of "this core class of 'testimonial' statements" exist:

1) *ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and

3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51.

The State argues that the above examples of testimonial statements provided by *Crawford* do not include anything similar to the videotaped interview at issue in this matter. The State also argues that the third formulation of testimonial statements is salient and asserts that an interview of a young child cannot be deemed testimonial if the child cannot reasonably comprehend that the statements may be later used at trial. Mr. Bentley, on the other hand, argues that J.G.'s statements during the videotaped interview were testimonial because the interview was conducted in conjunction with law enforcement officials and the purpose of the interview was to gather information to use in the investigation and prosecution of the sexual abuse allegations against him. Mr. Bentley also argues that the statements were testimonial because J.G. knew that reporting a claim of sexual abuse would result in legal action.

The Iowa Supreme Court has not yet confronted the application of *Crawford* although such claims have been presented to it. In *State v. Williams,* 695 N.W.2d 23, 29 (Iowa 2005), the defendant argued his trial counsel was ineffective due to his failure to object to the alleged domestic abuse victim's hearsay statements on the grounds that said statements were

in violation of his Sixth Amendment Confrontation Clause rights pursuant to *Crawford.* The court declined to address the applicability of *Crawford* to the situation before it, finding that the decision cannot be applied retroactively to support a claim for ineffective assistance of counsel. *Id.* In so holding, the court recognized "the law to be an evolving process that often makes the resolution of legal questions a composite of several cases." *Id.* at 30. Therefore, this Court will attempt to "gain a . . . view of the puzzle before arranging the pieces" by reviewing other state and federal cases that have addressed the issue of whether a child's statements to an interviewer regarding child abuse allegations are testimonial under *Crawford. Id.*

1. Review of federal and state court cases

The courts that have found a minor child's statements during an interview regarding abuse allegations to be testimonial base their analysis on a combination of the following factors: 1) the formality of the questioning; 2) government involvement in the interview; and 3) the investigative or prosecutorial purpose of the interview. *See e.g., United States v. Bordeaux,* 400 F.3d 548, 556 (8th Cir. 2005) (videotaped interview of minor child at a child evaluation center was testimonial because, like police interrogations, the interview was formal, there was government involvement and the purpose of the interview was to collect information for law enforcement officials);

Snowden v. State, 846 A.2d 36, 47 (Md. Ct. App. 2004) (minor children's statements to a social worker were testimonial where the children were interviewed for the "expressed purpose of developing their testimony"); *State v. Bobadilla,* 690 N.W.2d 345, 349 (Minn. Ct. App. 2004) (statements made by a four-year-old during a videotaped interview conducted by a child protection worker and police officer were testimonial where the interviewer asked the child specific questions as to whether anyone had hurt him, who and how, which indicated the interview was conducted for the purpose of developing a case against the defendant); *In re T.T.,* 815 N.E.2d 789, 802 (Ill. Ct. App. 2004) (seven-year-old's statements to a social worker were testimonial where the social worker was working at the behest of and in tandem with the State's attorney with the intent and purpose of assisting in prosecutorial effort); *People v. Sisavath,* 118 Cal.Rptr.4th 1396, 1402 (Cal. Ct. App. 2004) (minor child's statements during videotaped interview at a facility designed for interviewing child suspected of being victims of child abuse were testimonial because by the time the interview took place, "the original complaint and information had been filed and a preliminary hearing had been held").

The courts that have found a minor child's statements during an interview regarding abuse allegations to not be testimonial emphasize: 1) the lack of government involvement; 2) questioning conducted by non-governmental employees; and 3) the purpose of questioning is for medical treatment or diagnosis. *See*

e.g., State v. Vaught, 682 N.W.2d 284, 291 (Neb. 2004) (four-year-old's statement to an emergency room doctor was not testimonial because the doctor questioned the child for the purpose of medical treatment and there was no indication of government involvement in the initiation of the exam or during the course thereof); *State v. Scacchetti,* 690 N.W.2d 393, 396 (Minn. Ct. App. 2005) (three-year-old's videotaped statements to a specialist from a child resource center were not testimonial because the interviewer's purpose was to provide medical diagnosis and the interviewer was not working on behalf of investigating police officers or other government officials); *State v. Fisher,* 108 P.3d 1262, 1269 (Wash. Ct. App. 2004) (two-year-old's statements to doctor while in hospital were not testimonial where the doctor questioned the victim as a part of the efforts to provide medical treatment and there was no indication of a purpose to prepare testimony for trial); *People v. Geno,* 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (holding in dicta that a two-year-old's statement to the executive director of a child assessment center during the course of the director's interview of the child was not testimonial because the interviewer was not a government employee).

The rationale of each of these courts and the importance assigned to the aforementioned factors varies considerably. Some base their reasoning solely upon the Court's identification of modem practices that are closely linked to the abuses at which the Confrontation Clause was directed, i.e. police interrogation, and

attempt to analogize the interview of the child to the defining characteristics of such practices. See *Bordeaux,* 400 F.3d at 556. *But see Evans v. Luebbers,* 371 F.3d 438 (8th Cir. 2004) (court found that statements a wife made before her death regarding her fear of her husband were not testimonial because these statements were not one of the express examples provided by *Crawford*).

Other courts concentrate on the three formulations of the core class of testimonial statements identified by *Crawford.* See *Scacchetti,* 690 N.W.2d at 396; *Sisavath,* 118 Cal.Rptr.4th at 1402, n.3; *People v. Vigil,* 104 P.3d 258, 262-263 (statements made by a seven-year-old child during a videotaped interview conducted by a police officer were testimonial). These courts' analyses most often focus on the third formulation; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford,* 541 U.S. at 51. The courts have interpreted the reference to "objective witness" in two different ways: 1) objective witness refers to an objective witness in the same category of persons as the actual witness, *Scacchetti,* 690 N.W.2d at 396; and 2) objective witness refers to an objective observer. *Sisavath,* 118 Cal.Rptr.4th at 1402, n.3. In both *Scacchetti,* and *Sisavath,* the children were interviewed at specially designed facilities for interviewing and diagnosing children suspected of being victims of abuse by trained interviewers, and the interviews were videotaped. However, although

the children were questioned under very similar circumstances, the court in *Scacchetti* found the statements were not testimonial while the court in *Sisavath* found the statements were testimonial because of their different interpretations of "objective witness." *Scacchetti,* 690 N.W.2d at 396 (defendant failed to establish these circumstance would lead the "three-year-old to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have that expectation"); *Sisavath,* 118 Cal.Rptr.4th at 1402, n.3 (child's statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer).

2. Application

This Court finds that J.G.'s statements to Ms. Matuszek during the videotaped interview at St. Luke's Child Protection Center were not testimonial. First, the statements do not fit within those examples that *Crawford* identifies as clearly testimonial, i.e., J.G.'s statements were not testimony at a preliminary hearing, before a grand jury, or at a former trial; or statements made during police interrogation. *Crawford,* 541 U.S. at 51. Unlike the court in *Bordeaux,* this Court finds that J.G.'s interview at the Child Protection Center was not similar to a police interrogation because the questioning in this case was not formal, there was minimal government involvement, and the purpose of the interview was not solely related to law enforcement. *Bordeaux,* 400 F.3d at

556. The Court will discuss its reasoning as to these factors in more detail below. Second, the statements do not fit within any of the three formulations of the core class of testimonial statements identified by *Crawford*. *Crawford,* 541 U.S. at 51. J.G.'s statements were not *ex parte* in-court testimony or its functional equivalent. *Id.* Nor were her utterances extrajudicial statements contained in formalized materials. *Id.* As to the third formulation, this Court adopts the "objective witness" interpretation utilized by the court in *Scacchetti*. *Scacchetti,* 690 N.W.2d at 396. Therefore, the question before the Court is whether the circumstances surrounding the contested statements led the ten-year-old to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have that expectation. The Court's examination of the circumstances surrounding Ms. Matuszek's interview of J.G. will focus in particular on the following factors identified as important by other courts: 1) the formality of questioning; 2) the extent of government involvement; and 3) the purpose of the interview. *See e.g., Bordeaux,* 400 F.3d at 556; *In re T.T.,* 815 N.E.2d at 802; *Scacchetti,* 690 N.W.2d at 396.

Ms. Matuszek's questioning of J.G. was not formal. She asked J.G. open-ended, non-leading questions in a relaxed atmosphere in a room designed to be comfortable for children. The government's involvement in the interview was peripheral, unlike the government involvement in *Vigil* where a police officer conducted the questioning of the child abuse

victim. *Vigil,* 104 P.3d at 262. *See also Sisavath,* 118 Cal.Rptr.4th at 1402 (the prosecutor, as well as an investigator from the prosecutor's office, were present at the interview of the child). Ms. Matuszek conducted the interview of J.G. at the request of Pam Holtz of the Department of Human Services and Investigator Ann Deutmeyer of the Cedar Rapids Police Department. Ms. Matuszek's interview of J.G. took place in the Center's interview room with only J.G. and Ms. Matuszek present. Like the interview of the child in *Geno,* a non-government employee, Ms. Matuszek, exclusively conducted the questioning of J.G. during the interview. *Geno,* 683 N.W.2d at 692. However, she did leave the room once to confer with Ms. Holtz and Ms. Deutmeyer who were observing the interview behind an observation mirror. Ms. Matuszek informed J.G. that Ms. Holtz and Ms. Deutmeyer were observing the interview, but J.G. did not seem concerned with this and did not refer to or question their presence during the interview. Ms. Matuszek stated that she never talked with J.G. about the interview being used to for the basis of a prosecution against Mr. Bentley, nor did they discuss a court case of any type during the interview. Unlike the defendant in *Sisavath,* at the time of the interview herein, there were no charges against Mr. Bentley, nor had he been arrested or questioned by the police *Sisavath,* 118 Cal.Rptr.4th at 1402. Therefore, government involvement in J.G.'s interview was minimal.

The purpose of the interview is more difficult to ascertain. The evidence presented to the Court reveals that J.G. had a significant history of medical and behavioral problems. J.G. was an inpatient at St. Luke's Hospital several times in relation to her behavior problems, mood swings, and an attempt to strangle herself. She was hospitalized at St. Luke's on November 14, 2004, just two days before her interview with Ms. Matuszek at the St. Luke's Child Protection Center. J.G. volunteered to Ms. Matuszek why she was at the Center, which Ms. Matuszek testified was unusual because she normally has to ask the child why they are at the Center. However, in J.G.'s case, as Ms. Matuszek was beginning to explain the rules of the interview room, J.G. "reported that the reason she was acting this way (referring to having fits) was because she was molested." State's Exhibit 1. After the conclusion of J.G.'s interview, she underwent a medical exam by the Center's pediatrician. Unlike *Snowden,* where the express purpose of the interview was to develop the children's testimony for trial, Ms. Matuszek stated that her purpose in interviewing J.G. was merely to gather information. *Snowden,* 846 A.2d at 47. Therefore, the Court concludes this evidence establishes the overriding purpose of J.G.'s interview was for medical treatment, although a law enforcement purpose was also likely present.

The Court finds that these circumstances indicate that J.G. did not believe her disclosures would be available for use at a later trial. In fact, J.G.'s

statement to Ms. Matuszek as to the reason why she was at the Center indicates that J.G. believed her presence at the Center was related to her inpatient stays at St. Luke's Hospital for her behavior problems. Furthermore, J.G. seemed ambivalent to the observation of the interview by Ms. Deutmeyer and Ms. Holtz, not referring to them or questioning the reason for their presence at any time during the interview. The Court rejects Mr. Bentley's argument that J.G. knew that reporting a claim of sexual abuse would result in legal action against the accused. Mr. Bentley asserts that J.G. appeared to be of normal development, both physically and mentally, and as such, she was clearly capable of appreciating there are consequences for illegal behavior. While this may be true, academics have suggested that young children making a statement to authorities may not understand that sexual abuse is wrong or that a perpetrator is subject to punishment as a result. *Children as Victims and Witnessess in the Criminal Trial Process: The Conundrum of Children, Confrontation, and Hearsay,* Richard D. Friedman, 65 Law & Contemporary Problems 243, 250 (2002). Like the Court in *Scacchetti,* this Court also finds the circumstances surrounding the interview suggest that a child of J.G.'s age would not reasonably believe her disclosures to Ms. Matuszek would be available for use at a later trial. The questioning was informal, there was minimal government involvement, and there is no evidence indicating that the main or sole purpose of the interview was to develop a case against Mr. Bentley. Ms. Matuszek's interview of J.G.,

a ten-year-old alleged victim of sexual abuse, at St. Luke's Child Protection Center "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Crawford,* 541 U.S. at 51. Therefore, the Court concludes that J.G.'s statements in the videotaped interview at St. Luke's Child Protection Center were not testimonial. Hence, Mr. Bentley's Sixth Amendment Confrontation Clause rights, as articulated by *Crawford,* will not be violated by the admission of the videotape of the interview at trial in this matter.

The Court's inquiry regarding the admissibility of the videotape does not end here. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts,* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* at 68. This Court must therefore examine the admissibility of the videotape according to Iowa's evidentiary laws.

II. Hearsay Analysis

The State argues that J.G.'s out-of-court statements are admissible pursuant to two hearsay exceptions: 1) the residual hearsay exception under I.R.Evid. 5.803(24); and 2) the medical diagnosis or treatment hearsay exception under I.R.Evid. 5.803(4). Mr. Bentley argues that both these hearsay exceptions are inapplicable.

A. Whether J.G.'s statements are admissible under the residual exception to the hearsay rule, I.R.Evid. 5.803(24)?

In *State v. Rojas,* 524 N.W.2d 659 (Iowa 1994), the Iowa Supreme Court ruled that a social worker's interview of a ten-year-old minor child at St. Luke's Child Protection Center was properly admitted under the residual exception to the hearsay rule pursuant to I.R.Evid. 5.803(24). The court in *Rojas* noted that "the requirements for admissibility under the residual exception are five-fold: trustworthiness, materiality, necessity, service of the interest of justice, and notice." *Id.* at 662-62 (citing *State v. Brown,* 341 N.W.2d 14 (Iowa 1983)). The court also made note of the special provision contained in Iowa Code § 915.38(3), which provides:

> The court may upon motion of a party admit into evidence the recorded statements of a child, as defined in Section 702.5, describing sexual contact performed with or on the child, not otherwise admissible in evidence by statute or court rule if the court determines that the recorded statement substantially comport with the requirements for admission under Rule of Evidence 5.803(24) or 5.804(b)(5).

Iowa Code § 915.38(3). *Rojas* stated that § 915.38(3) makes it "clear that the residual exception to the hearsay rule may be used to admit statements made by the child sex abuse victim when the requirements of the exception are met." *Rojas,* 524 N.W.2d at 663.

In its analysis of the five factors utilized to determine the admissibility of the videotaped interview under the residual hearsay exception; *Rojas* first considered the issue of trustworthiness. In finding the videotape to be trustworthy, *Rojas* found as significant the fact that the interviewer asked the child open-ended and non-leading questions. *Id.* at 663. The court noted the non-leading questions asked by the interviewer "were not the kind that would prompt a child to fabricate the responses B.R. gave." *Id.* The court also found as significant the child's detailed account of the abuse and ability to remember specific details such as where other family members were when the abuse occurred. *Id.* (citing *State v. Lonergan,* 505 N.W.2d 349, 355 (Minn. Ct. App. 1993) (child's good memory of details is a circumstantial guarantee of trustworthiness)). In this case, J.G. was similarly asked open-ended and non-leading questions that were not of a type that would prompt a child to fabricate the responses she gave. Furthermore, J.G. gave a very detailed and descriptive account of the alleged abuse she suffered and noted where other family members, such as her sister and Mr. Bentley's wife, were when the abuse supposedly occurred. J.G. described how Mr. Bentley would put spit between her legs and how white stuff came out of his penis and went between her legs. The court in *Rojas* found that similar statements made by the child in that case have a "ring of veracity" because they are "beyond the experience of the average ten-year-old." *Rojas,* 524 N.W.2d at 663. Lastly, like the victim in *Rojas,* J.G.'s statements were consistent

throughout the interview, which enhances the reliability of the statements. *Id.* (citing *Doe v. United States,* 976 F.2d 1071, 1079 (7th Cir. 1992) (reliability is generally enhanced when a child consistently repeats statements)). Therefore, this Court finds that the videotape in this matter has sufficient circumstantial guarantees of trustworthiness.

As for the remaining requirements, the Court concludes that the materiality requirement is clearly met because the videotape contains J.G.'s statement that Mr. Bentley sexually abused her. *Id.* The videotape is also the most probative evidence linking Mr. Bentley to the crime because it is the best direct evidence implicating Mr. Bentley as J.G.'s abuser. *Id.* Mr. Bentley has received adequate notice of the State's intention to use the videotape at trial. The Court is satisfied that admitting the evidence serves the interests of justice, especially considering the fact that J.G. is now deceased. In conclusion, the Court finds that the "appropriate showing of reliability and necessity were made, and admitting the evidence advances the goal of truth-seeking expressed" in the Iowa Rules of Evidence. *Id.* Therefore, the videotape is admissible under the residual hearsay exception of I.R.Evid. 5.803(24).

Mr. Bentley argues that *Rojas* is inapplicable here because this case was decided before *Crawford,* and it relies on the now-overturned case of *Roberts.* However, as the Court stated earlier, *Crawford* is concerned solely with nontestimonial hearsay. *Crawford,* U.S. 51 at 68. Therefore, where nontestimonial

hearsay is present, the analysis in *Roberts* may still be viable. *Id.*; *See also Vaught,* 682 N.W.2d at 327. Moreover, in averring that States should be afforded flexibility in their development of hearsay law regarding nontestimonial statements, *Crawford* notes that a State could exempt such statements from a Confrontation Clause analysis altogether. *Crawford,* U.S. at 68. Thus, the Court's application of the residual hearsay exception and reliance on *Rojas* is not misplaced given the finding that J.G.'s statements were not testimonial.

B. Whether J.G.'s statements are admissible under the medical diagnosis or treatment exception to the hearsay rule, I.R.Evid. 5.803(4)?

Iowa Rule of Evidence 5.803(4) provides:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

I.R.Evid. 5.803(4).

The State relies on the case of *State v. Tracy,* 482 N.W.2d 675, 681 (Iowa 1992) to support its assertion that J.G.'s statements fit within the medical treatment hearsay exception. In *Tracy,* the court declared: "Statements by a child abuse victim concerning the

identity of the abuser made to a physician during an examination are 'reasonably pertinent to diagnosis or treatment' where the abuser is a member of the victim's immediate household." Mr. Bentley argues that *Tracy* is inapplicable here because J.G.'s statements were not made to a physician and Mr. Bentley is not a member of the victim's immediate household. Although one purpose of the interview of J.G. was for medical treatment, the Court is constrained by the interpretation of the medical treatment hearsay exception in *Tracy*. Therefore, the Court must agree with Mr. Bentley and find that *Tracy* does not apply because Ms. Matuszek is not a licensed physician or nurse and Mr. Bentley was not a member of the victim's immediate household.

The State also asserts that the decision by the Iowa Court of Appeals in *State v. Campbell,* 539 N.W.2d 491 (Iowa Ct. App. 1995) applies to this case. *Campbell* involved statements made by a domestic abuse victim to a nurse. Mr. Bentley again argues that this case is inapplicable. The issue before the court in *Campbell* was whether a defendant's right to confrontation is violated by admitting hearsay evidence without first requiring the State to produce the declarant as a witness or establish the declarant's unavailability. *Campbell,* 539 N.W.2d at 493. *Campbell* did not discuss the applicability of the medical diagnosis hearsay exception to the facts of the case. *Id.* The Court agrees with Mr. Bentley and finds that *Campbell* is also inapplicable to the case at hand. Therefore, the Court rejects the State's argument

that the videotape is admissible under the medical diagnosis or treatment hearsay exception.

RULING

In conclusion, the Court finds that J.G.'s statements to Ms. Matuszek during the videotaped interview at St. Luke's Child Protection Center were not testimonial. Since the new rule announced by the United States Supreme Court in *Crawford* is only concerned with testimonial statements, the Court finds that Mr. Bentley's Sixth Amendment Confrontation Clause rights will not be violated by the admission of the videotape of the November 16, 2004, interview. The Court also finds that the videotape is admissible pursuant to the residual hearsay exception in I.R.Evid. 5.803(24) under the reasoning of the Iowa Supreme Court in *Rojas*. The Court determines that the medical diagnosis or treatment hearsay exception is not applicable in this matter.

IT IS, THEREFORE, ORDERED that the videotape of the St. Luke's Child Protection Center November 16, 2004, interview of the alleged victim, minor child J.G., is admissible at trial in this matter.

Clerk to notify counsel.

Dated: May 20, 2005.

/s/ Thomas L. Koehler
THOMAS L. KOEHLER,
Judge of the Sixth
Judicial District of Iowa